Supreme Court, U.S.
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No. 10-992

In the
Supreme Court of the United States

GUILLERMO GUARDADO-GARCIA,
Petitioner,

v.

ERIC H. HOLDER, JR.,
United States Attorney General,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether conviction under 42 U.S.C. §408(a)(7)(B) is a "Crime Involving Moral Turpitude" (CIMT) for purposes of 8 U.S.C. §1101(f) and 8 U.S.C. §1182(a) of the Immigration and Nationality Act, as determined by the Eighth Circuit in the instant case, or if the Ninth Circuit ruling in *Beltran-Tirado v. INS*,* ought to be followed instead, resulting in a finding that the Petitioner is indeed eligible to apply for cancellation of removal for non-permanent aliens under 8 U.S.C. §1229b(b).

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* 213 F.3d 1179 (9th Cir. 2000)

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Eighth Circuit Court of Appeals included Eric Holder, the United States Attorney General, and the petitioner, Guillermo Guardado-Garcia (Mr. Garcia).

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The Petitioner, Guillermo Guardado-Garcia, respectfully prays that a *Writ* of *Certiorari* issue to review the judgment and order of the United States Court of Appeals, Eighth Circuit rendered in these proceedings on August 4, 2011.[1]

OPINION BELOW

The reported decision of the United States Court of Appeals, *Guardado-Garcia v. Holder*, 615 F.3d 900, *reh'g denied*, ____ F.3d ____ (8th Cir. 2010), denying the petition for review of the decisions of the Executive Office for Immigration Review that Petitioner's guilty plea under 42 U.S.C. § 408(a)(7)(B) is a crime involving moral turpitude is reprinted in the Appendix at page 3a, *infra*. The unreported order of the United States Court of Appeals, Eighth Circuit, denying rehearing is reprinted in the Appendix at page 1a, *infra*. The decisions of the Board of Immigration Appeals and the Immigration Judge are both unreported and have been reprinted in the Appendix at pages 10a and 15a, respectively.

JURISDICTION

The judgment of the United States Court of Appeals, Eighth Circuit, was entered August 4, 2011. A timely petition to that court for rehearing or, in the alternative, for rehearing *en banc*, was denied November 2, 2010.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

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[1] Rehearing was denied on November 4, 2010.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The relevant statutory provisions involved in this case, 42 U.S.C. §408, 8 U.S.C. §1101(f), 8 U.S.C. § 1182(a), and 8 U.S.C. §1229b(b), are reproduced in Appendix E.

STATEMENT OF THE CASE

Summary. This petition concerns the denial by the Eighth Circuit Court of Appeals of the petition for review from the decisions of the Board of Immigration Appeals and the Immigration Judge that Petitioner's guilty plea under 8 U.S.C. § 408 constitutes a crime involving moral turpitude. In particular, the case involves the failure of the Eighth Circuit to follow the Ninth Circuit decision in *Beltran-Tirado v. INS*, 213 F.3d 1179 (9th Cir. 2000), under the same statute, resulting in the inability of the petitioner to qualify to apply for cancellation of removal as a non-permanent alien under 8 U.S.C. 1134b(b).

Facts and procedural history. Mr. Garcia pled guilty to using a false social security to gain access to a secured area. *U.S. v. Garcia*, Cause No. 4:02-cr-00252-CAS (E.D. Mo. 2002). Mr. Garcia's only reason for using a false social security number in this manner was to be able to do his job as a ticket agent for Continental Airlines. He is not a threat to national security. When he eventually obtained a valid social security number due to his qualifying for Temporary Protected Status (TPS), he informed his employer of the new number. Later the government brought the criminal charges and after he pled guilty he was no longer eligible for TPS due to his felony conviction.

Immigration proceedings. Mr. Garcia was placed in immigration proceedings and sought to apply for cancellation of removal due to his long residence in the United States and the existence of qualifying relatives (USC children). The immigration judge denied his request to be allowed to apply for cancellation, finding that he had been convicted of a CIMT. The Board of Immigration Appeals upheld the decision of the immigration judge and Mr. Garcia petitioned for review to the Eighth Circuit. The Eighth Circuit denied his petition for review despite a finding by the Ninth Circuit in a case arising under the same subsection of law as Mr. Garcia's that such a crime was not a CIMT. In doing so, the Court below followed its own precedent concerning convictions under a different subsection of the same statute, as well as the holding of the Sixth Circuit regarding a Mississippi statute.

REASONS FOR GRANTING THE WRIT

I. THERE IS A SPLIT AMONG THE CIRCUITS REGARDING WHETHER CONVICTION UNDER THE STATUTORY LANGUAGE INVOLVED IN THIS CASE IS A CRIME INVOLVING MORAL TURPITUDE FOR THE PURPOSES OF IMMIGRATION LAW, WITH THE NINTH CIRCUIT FOLLOWING AN INTERPRETATION BASED ON LEGISLATIVE HISTORY AND THE EIGHTH CIRCUIT TAKING A DIFFERENT APPROACH.

A. Ninth Circuit Reasoning.

Petitioner was convicted under subsection (B) of 42 U.S.C. § 408(a)(7), which contains the same language as former section 42 U.S.C. § 408(g)(2), under which the petitioner in *Beltran-Tirado v. INS.*, 213 F.3d 1179 (9th Cir. 2000), was convicted.

Petitioner had been working as a ticket agent for Continental Airlines using the social security number in question. When he received a lawful social security number under the program for Temporary Protected Status for persons from El Salvador, the Petitioner supplied the correct social security number to his employer.

In Beltran-Tirado's case, she used her social security number to work at a restaurant. The reporting of wages to the Social Security Administration by the restaurant management resulted in the person to whom the number actually was assigned being questioned by the Internal

Revenue Service as to whether she should be paying additional taxes. (Beltran-Tirado found the social security card of the true holder on a bus and used it thereafter as her own.) The true owner contacted Beltran-Tirado and requested that she desist from using the number as her own. Beltran-Tirado continued to use the social security number and was eventually prosecuted for doing so. 213 F.3d at 1182.

The analysis based on the legislative history, as spelled out in *Beltran-Tirado*, suggests that at least in some instances, if not many, the adjudicator should conclude that convictions under several of the subsections of 42 U.S.C. 408 are not crimes involving moral turpitude.

The Ninth Circuit opinion in *Beltran-Tirado* is based heavily on a reading of the legislative history of an amendment to 42 U.S.C. § 408. 213 F.3d at 1183-84. There it is noted that 42 U.S.C. § 408 was amended in 1990 by adding a new subsection 408(d),[2] which exempts from prosecution certain persons who may have used a false social security number and who have gained permanent resident status by amnesty or registry. The court states that the exemption from prosecution of these persons indicates Congress' view of the degree of moral turpitude, or lack thereof, involved in these acts. See footnote 6 and the text accompanying it of *Beltran-Tirado*. 213 F.3d at 1183.

> The Conferees intend that this exemption apply only to those individuals who use a false social security number to engage in otherwise lawful

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[2] This subsection has since been redesignated as 408(e)

> conduct. For example, an alien who used a false social security number in order to obtain employment which results in eligibility for social security benefits or the receipt of wage credits would be considered exempt from prosecution.
>
> . . .
>
> The Conferees believe that individuals who are provided exemption from prosecution under this proposal should not be considered to have exhibited moral turpitude with respect to the exempted acts for purposes of determinations made by the Immigration and Naturalization Service.

H.R. Conf. Rep. No. 101-964, at 948 (1990), reprinted in 1990 U.S.C.C.A.N. 2374, 2653 ("Conference Report"). This interpretation applies to "any alleged conduct described in paragraph (6) or (7) of subsection (a)" but per footnote 8 of *Beltran-Tirado*: "Congress was careful to exclude from the exemption those 'who used a false social security number for otherwise illegal activity such as bank fraud or drug trafficking.' . . . Also excluded were aliens 'who sold social security cards, possessed social security cards with intent to sell, possessed counterfeit social security cards with intent to sell or counterfeited social security cards with intent to sell.'" 213 F.3d at 1183.

Petitioner contends that the logic of *Beltran-Tirado* and the logic expressed by the conference committee in the legislative history are more in keeping with the way the term "crime involving moral turpitude" has traditionally been interpreted, and the way it ought to

be interpreted in the future, under the immigration law.[3]

B. Eighth Circuit Approach.[4]

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[3] In determining whether the Petitioner has committed a crime involving moral turpitude, one ought to look to the ultimate goal which he was seeking to accomplish. While those who might be seeking to commit an ultimately turpitudinous act such as bank fraud or sale of false social security cards, or perhaps more relevant to this case, someone seeking to gain access to a secured area for the purpose of carrying out a terrorist act, would be considered to have committed a crime involving moral turpitude, someone such as the Petitioner who only sought to work for fair wages to support his family ought not to be disqualified on account of this designation from applying for relief which would be precluded by conviction of a CIMT.

[4] Petitioner has endeavored to identify all relevant cases in the circuit courts arising out of the statute in question. In addition to this case, other circuits have decided cases arising under 42 U.S.C. 408(a)(7)(B), or its previous incarnation as 42 U.S.C. 408(g)(2), in relatively few instances. *Beltran Tirado v. INS*, 213 F.3d 1179 (9th Cir. 2000) is the best example. In that case, the petitioner had been convicted under former 42 U.S.C. § 408(g)(2), which contained the same language now found in 42 U.S.C. 408(a)(7)(B). As indicated above, the petitioner in that case refused to cease using the social security number in question despite a specific request from the rightful holder, while the Petitioner here corrected the incorrect number when he received his social security number from his being granted Temporary Protected Status. Mr. Garcia used his social security number to work, just as did Beltran-Tirado. His case presents a scenario that is at least as compelling as the one in *Beltran Tirado*.

Other cases involving convictions under this same language are *Aguilera v. Kirkpatrick*, 241 F.3d 1286 (10th Cir. 2001), *Beltran-Resendez v. INS*, 207 F.3d 284 (5th Cir. 2000), and *Balogun v. Ashcroft*, 270 F.3d 274 (5th Cir. 2001). *Aguilera* involved an appeal of a district court habeas case which arose out of the refusal of the Department of Homeland Security to join in

The Eighth Circuit decided Petitioner's case based on precedent, purporting to follow one of its own cases (*Lateef v. Dept. of Homeland Security*, 592 F.3d 926 (8th Cir. 2010), which cites a a Fifth Circuit case (*Hyder v. Keisler*, 506 F.3d 388 (5th Cir. 2007)), both of which were based on convictions under 42 U.S.C. § 408(a)(7)(A), and a Sixth Circuit case (*Serrato-Soto v. Holder*, 570 F.3d 686 (6th Cir. 2009)), which was based on a conviction under a Mississippi statute. Although convictions under 408(a)(7)(A) might appear to be subject to the same exemptions provided by Congress as convictions under 408(a)(7)(B) insofar as

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a motion to reopen, and the court of appeals ultimately held that the individual involved in that case failed to state a claim upon which relief could be granted under Federal Rule of Civil Procedure 12(b)(6) Therefore, it did not reach the issue whether the conviction of one of the habeas petitioners under the language in question was a CIMT. In *Beltran-Resendez*, the Fifth Circuit held that the petitioner in that case was ineligible to apply for registry due to his conviction of several disqualifying offenses. The court did not cite the specific subsection of 42 U.S.C. 408 under which the petitioner had been convicted but stated that he had pled guilty to "four counts of using a false social security number on an Employment Eligibility verification form in violation of . . . 42 U.S.C. 408." *Beltran Resendez*, at 286. In addition to these convictions, he had apparently been convicted of possession of PCP and for felony robbery. *Id.*, at 285 Due to his convictions, the court concluded that the petitioner had not met his burden of proof to show that he was not ineligible for registry. The court did not specifically consider the issue put before the court in this case and in *Beltran-Tirado*. Finally, in *Balogun*, the court noted that the petitioner had been convicted under former 42 U.S.C. 408(g)(2) as well as other criminal statutes. The issue was whether the court had jurisdiction to hear the appeal of his denial of Convention Against Torture relief. Due to the multiple criminal convictions, regardless whether they were CIMT's, the court held that the court lacked jurisdiction to consider his petition for review.

disqualification from immigration benefits are concerned, there are differences in the wording which suggest convictions under 408(a)(7)(A) crimes are more likely to be crimes involving moral turpitude.

Petitioner maintains that a conviction such as his own under 48 U.S.C. 408(a)(7)(B), or former subsection 408(g)(2), is simply not a crime involving moral turpitude. It would appear that a major argument made in the Ninth Circuit case regarding the legislative history of the law in question is broad enough to encompass conviction under other parts of the law; however, the legislative history is just one reason for considering 408(a)(7)(B) not to be a crime involving moral turpitude. There are other reasons as well.[5]

C. Discussion.

To begin the analysis of whether this is indeed a crime involving moral turpitude, Petitioner notes that most courts have applied a so-called "modified categorical approach" which first involves looking at the statute in question and then, if necessary, looking beyond that. See, for example, IJ opinion at 5, reprinted at 19a. In the past, and under the rules still followed in a number of circuits, if the issue is not clear upon looking at the statute, then the adjudicator looks to see what additional information is contained in the documents of conviction (indictment, plea

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[5] It is also worth noting that among the other circuit courts which discussed the issue, none of them examined closely to see if any of the exclusions from the exemptions of subsection 408(d) might have applied to distinguish them from *Beltran-Tirado*

colloquy, etc.). *Id.* In these cases, when these records do not show that a CIMT has been committed, the adjudicator must conclude the inquiry in the negative.[6]

Circuit courts have often not been careful in observing distinctions that have traditionally been meaningful in determining what is a CIMT for immigration law purposes. Petitioner observes that textual analysis of the subsections of the statute 42 U.S.C. § 408 suggests that a conviction under subsection 408(a)(7)(B) (former subsection 408(g)(2)) is less likely to be a CIMT than a conviction under other sections of the statute mentioned in the legislative history.

The reason that subsection 408(a)(7)(A) is different than subsection 408(a)(7)(B) when it comes to CIMT analysis is because it contains additional language ("willfully, knowingly, and with intent to deceive") that is not contained in subsection 408(a)(7)(B). These words are frequently associated not just with false usage or representation but with out and out fraud, where there is an intent to gain more than what is honest and true for ones services. Thus, a conviction under subsection 408(a)(7)(B) ought, as a general rule,

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[6] Recently, the Attorney General (AG) added another potential step to the analysis. In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the AG stated that if the issue is not clear, the adjudicator may look beyond the record of conviction. Petitioner contends that his crime should not be considered a CIMT based on the conviction record; however, if that is not sufficient to determine the issue, the conviction record cannot support an affirmative determination of CIMT and the case must at a minimum be remanded to the agency for a determination under *Silva-Trevino*. See discussion below.

to be considered less tupritudinous than a conviction under subsection 408(a)(7)(A). Petitioner thus contends that the other cases regarding convictions under subsection 408(a)(7)(A), which are relied upon by the court below, should be less controlling than the outcome of the Ninth Circuit decision in *Beltran-Tostado v. INS*, 213 F.3d 1179 (9th Cir. 2000) and the logic of the legislative history recited above.

Another decision relied upon by the Eighth Circuit also refers to a decision which involves a state statute containing similar language to subsection 408(a)(7)(A), so that case should also be given less weight when analyzing a conviction involving subsection 408(a)(7)(B). These observations further undermine the reasoning of the court below and add impetus for the Court to grant *certiorari* in order to determine the important issue raised by the decision in this case.

Furthermore, one cannot conclude on the basis of the statutory text of 408(a)(7)(B) and the conviction record of this Petitioner that he has committed a crime involving moral turpitude.

As noted by the Immigration Judge, the statutory language in question cannot be said to uncategorically define a crime involving moral turpitude. IJ opinion at 19a. As a result, the BIA and the IJ took the limited step of looking to the conviction record of this Petitioner, in particular, they looked to the indictment which "states that on September 23, 2001, Respondent knowingly and falsely represented, with an intent to deceive, and for the purpose of obtaining or retaining an airport identification badge, giving him access to secured areas, a number that was the Social Security

account number not assigned to him by the Social Security Administration." *Id.* (emphasis in original)

This language of the indictment, along with the statutory language of the statute, simply does not allow one to conclude that a crime of moral turpitude has been committed. Under the more traditional analysis, prior to *Silva-Trevino*, the adjudicator would be required to conclude that Petitioner's conviction was not a crime of moral turpitude. If the *Silva-Trevino* analysis were followed, the agency would be allowed to look outside the record of conviction to determine the CIMT issue. Petitioner does not necessarily seek to have the viability of *Silva-Trevino* determined in this case, but he does contend that the decision below cannot be justified, regardless whether *Silva Trevino* is followed. He therefore asks this Court to grant *certiorari* in order to issue its opinion remanding the case for further proceedings by the Eighth Circuit so that it may redetermine the issue whether it will order the case remanded to the agency with an order either (1) to determine that the crime in question is not a CIMT or (2) to reconsider the crime in question under the additional analysis of *Silva-Trevino* looking outside the conviction record. The Petitioner also asks the Court to clarify that if the court below follows option (2), the Petitioner must have a chance before the agency to submit evidence in addition to that considered by the IJ, or the Board, with regard to the issue of determining moral turpitude.

D. Effect of *Silva-Trevino*.

Shortly before the BIA issued its decision in this case, the Attorney General decided a case which substantially changed the analysis which it used to

determine the issue of what constitutes a "crime involving moral turpitude." In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the AG stated that, if after looking to the statute and relevant conviction records, the Board could not make a decision as to whether a crime was indeed a CIMT, then it would look to extra-record materials.

The government below took the position that applying *Silva-Trevino* would have no bearing on this case, since the IJ and BIA were able to decide the issue based on the statute and the conviction record. In fact, the IJ and the BIA drew conclusions, basically creating extra-record evidence from whole cloth, that were not supported by the conviction record. Instead of considering what was actually the effect on national security, they surmised that somehow, speculatively, national security was impacted by the actions of this Petitioner. This kind of *ultra vires* conclusion cannot be allowed. However, if the Court wishes to remand the case with both the government and the Petitioner's being allowed to submit evidence on the issue of national security before the agency, that process would no doubt lead to a fairer result than the one which has occurred to date.

If the Court were to decide to remand for a new decision, it might be premature for the Court to consider whether the Eighth Circuit has shown proper deference to the agency's decision in *Silva-Trevino* but neither has the Eighth Circuit shown deference to the agency's decisions regarding crimes involving moral turpitude, relying instead on its own decisions and the decisions of the Fifth and Sixth Circuit. Petitioner maintains that had any of the adjudicators (the Eighth Circuit, the BIA, or the IJ) followed a proper analysis

of the law regarding crimes involving moral turpitude, they could not have reached the decisions that were rendered.

The Court should grant *certiorari* to consider which of the differing interpretations of the law among the circuits ought to be followed, or, perhaps the Court will order a new standard to apply.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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Dated: January 31, 2011

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 08-3918

[Filed November 3, 2010]

Guillermo Garcia	)
	)
Petitioner	)
	)
v.	)
	)
Eric H. Holder, Jr., United States Attorney General	)
	)
Respondent	)
	)

Appeal from Board of Immigration Appeals
(A94-462-369)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

November 03, 2010

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 08-3918

[Filed August 4, 2010]

Guillermo Guardado-Garcia,	)
	)
Petitioner,	)
	)
v.	)
	)
Eric H. Holder, Jr., United States Attorney General,	)
	)
Respondent.	)
	)

Petition for Review of an Order of the Board of Immigration Appeals.

Submitted: September 21, 2009
Filed: August 4, 2010

Before RILEY,[1] Chief Judge, JOHN R. GIBSON, and MURPHY, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

Guillermo Guardado-Garcia, a native and citizen of El Salvador, petitions for review of the decision of the Board of Immigration Appeals (Board) affirming the immigration judge's (IJ) order of removal for having been convicted of a crime involving moral turpitude. Guardado-Garcia pleaded guilty in 2002 to misusing a social security number in violation of 42 U.S.C. § 408(a)(7)(B). Guardado-Garcia argues that his conviction for misusing a social security number did not involve moral turpitude and that he is therefore not removable. He also argues that the Board violated due process by not applying the appropriate law. We deny the petition.

I.

Guillermo Guardado-Garcia illegally entered the United States on or about December 30, 1989. He was later granted temporary protected status. On October 10, 2002, Guardado-Garcia pleaded guilty to the misuse of a social security number in violation of 42 U.S.C. § 408(a)(7)(B) for having applied for an employee identification badge at Lambert-St. Louis International Airport by using a social security number that was not assigned to him.

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[1] The Honorable William Jay Riley became Chief Judge of the United States Court of Appeals for the Eighth Circuit on April 1, 2010.

Removal proceedings commenced. Although Guardado-Garcia admitted to the factual allegations of misuse of a social security number and conceded that he was subject to removal as an alien illegally present in the United States, he denied the charge of inadmissibility relating to a crime involving moral turpitude.

On January 16, 2007, the IJ found that Guardado-Garcia's knowing misuse of a social security number was committed with an intent to deceive and for the purpose of "obtaining or retaining an airport identification badge, giving him access to secured areas." The IJ noted that "[t]he Social Security Administration assigned numbers so that these numbers will be identified with the person for future identification for lawful purposes[,]" and that in view of the potential security threats to the United States, "it is definitely in the interest of this country to make sure these numbers are appropriately assigned." The IJ sustained the charges of inadmissibility and ordered Guardado-Garcia removed to El Salvador.

On November 19, 2008, the Board adopted and affirmed the IJ's decision and dismissed Guardado-Garcia's appeal. The Board agreed that Guardado-Garcia's conviction under 42 U.S.C. § 408(a)(7)(B) was for a crime involving moral turpitude because it involved "both an intent to deceive and an impairment of government function." Guardado-Garcia petitions for review of the decision of the Board.

II.

We have jurisdiction pursuant to 8 U.S.C. § 1252(a)(2)(D) to review the "constitutional claims or

questions of law raised upon a petition for review." We review the Board's legal determinations de novo, Kim v. Holder, 560 F.3d 833, 836 (8th Cir.), cert. denied, 130 S.Ct. 393 (2009), deferring to the agency's interpretation of ambiguous statutory terms "so long as its interpretation is reasonable and consistent with the statute." Corado v. Ashcroft, 384 F.3d 945, 947 (8th Cir. 2004). We accord substantial deference to the Board's interpretation of immigration statutes and regulations. Kim, 560 F.3d at 836.

Guardado-Garcia contends that his conviction for misuse of a social security number under 42 U.S.C. § 408(a)(7)(B) does not fall within the definition of a crime involving moral turpitude. The indictment charged that Guardado-Garcia had "knowingly and falsely represented with an intent to deceive, and for the purpose of obtaining or retaining an airport identification badge giving him access to secured areas," that a social security number was his, when in fact it was not. Guardado-Garcia admits this statement is true, but he denies that he posed a security risk.

Crimes involving moral turpitude have been held to require conduct "that is inherently base, vile, or depraved, and contrary to accepted rules of morality and the duties owed between persons or to society in general." Lateef v. Dep't of Homeland Sec., 592 F.3d 926, 929 (8th Cir. 2010) (internal quotations omitted). "Crimes involving the intent to deceive or defraud are generally considered to involve moral turpitude." Id.

Here, the IJ concluded that Guardado-Garcia's misuse of a social security number in violation of 42 U.S.C. § 408(a)(7)(B) constituted a crime involving moral turpitude. The record supports that conclusion. In relevant part, the statute provides that a person commits a felony who

> for the purpose of obtaining . . . any other benefit to which he . . . is not entitled, . . . or for any other purpose – . . .
>
> (B) with intent to deceive, falsely represents a number to be the social security account number assigned by the Commissioner of Social Security to him . . ., when in fact such number is not the social security account number assigned by the Commissioner of Social Security to him . . ..

Intent to deceive for the purpose of wrongfully obtaining a benefit is an essential element of § 408(a)(7)(B). Accordingly, the Board's interpretation of that crime as one involving moral turpitude is reasonable. See Lateef, 592 F.3d at 929.

Next, we reject petitioner's argument that the Board violated due process by not applying the analysis set forth in Matter of Silva-Trevino, 24 I. & N. Dec. 687 (BIA 2008). Guardado-Garcia argues that the Board was bound to follow the Attorney General's ruling in Silva-Trevino and that its failure to do so is tantamount to an agency failing to follow its own rules. Petitioner's due process claim is without merit. We are bound by our circuit's precedent, and to the extent Silva-Trevino is inconsistent, we adhere to circuit law. See Jean-Louis v. Att'y Gen., 582 F.3d 462, 470-73 (3d

Cir. 2009) (concluding that "deference is not owed to Silva-Trevino's novel approach"). As outlined above, we determine that the Board's analysis was sound and that its conclusion is consistent with the established approach in our circuit.

We also reject the petitioner's reliance on Beltran-Tirado v. INS, 213 F.3d 1179 (9th Cir. 2000), which he contends stands for the proposition that a violation of § 408(a)(7)(B) is not a crime of moral turpitude. We have declined to follow Beltran-Tirado. Lateef, 592 F.3d at 930-31 (declining to apply Beltran-Tirado to § 408(a)(7)(A) conviction for using an unlawfully obtained social security number because its holding is limited by issues in case). Yet Guardado-Garcia argues that our rejection of Beltran-Tirado in Lateef does not control the outcome in this case because this case arises under a different subsection of 42 U.S.C. § 408.

We are not persuaded by petitioner's argument. Although Beltran-Tirado concluded that § 408(a)(7)(B) was not to be considered a crime involving moral turpitude, it did so in the context of a statutory exemption from prosecution for a limited category of cases. Lateef, 592 F.3d at 930-31. As we reasoned, "The mere fact that Congress chose to exempt a certain class of aliens from prosecution for certain acts does not necessarily mean that those acts do not involve moral turpitude in other contexts." Id. at 931 (internal quotation marks and citation omitted); Serrato-Soto v. Holder, 570 F.3d 686, 692 (6th Cir. 2009) (declining to follow Beltran-Tirado for the same reason and adhering to circuit precedent finding crimes of dishonesty within class of crimes involving moral turpitude). The Board's conclusion that Guardado-

Garcia's conviction involved moral turpitude is consistent with Lateef.

III.

The Board's conclusion that Guardado-Garcia's conviction involved moral turpitude is reasonable, and its interpretation of the ambiguous phrase "crime involving moral turpitude" is due deference. Accordingly, we deny the petition for review.

APPENDIX C

[SEAL]

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Groneck, Rachel, Esq.
9300 Olive Blvd
St. Louis, MO 63123-0000

DHS-Litigation Unit/OAK
P.O. Box 1128
Oakdale, LA 71463-1128

Name: GUARDADO-GARCIA, GUILLERMO ALBERTO A094-462-369

Date of this notice: 11/19/2008

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

/s/ Donna Carr
Donna Carr
Chief Clerk

Enclosure

Panel Members:
Malphrus, Garry D.

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A094 462 369 - St. Louis, MO

Date: NOV 19 2008

In re: GUILLERMO ALBERTO GUARDADO-GARCIA a.k.a. Guillermo Garcia a.k.a. Gil Garcia

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Rachel Groneck, Esquire

ON BEHALF OF DHS: Craig A. Harlow
Assistant Chief Counsel

In a decision dated January 16, 2007, the Immigration Judge found the respondent subject to removal as charged, and ordered the respondent removed. The respondent has appealed from that decision. The appeal will be dismissed.

We find that the factual findings of the Immigration Judge are not clearly erroneous and we adopt and affirm the Immigration Judge's thorough and well-reasoned decision. *Matter of Burbano,* 20 I&N

Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those which the Immigration Judge articulated in his or her decision"); *see generally* 8 C.F.R. § 1003.1(d)(3)(i) ("facts determined by the immigration Judge, including findings as to the credibility of testimony, shall be reviewed only to determine whether the findings of the Immigration Judge are clearly erroneous"). We concur in the Immigration Judge's determination that the respondent's conviction for violation of 42 U.S.C. § 402(a)(7)(B)[1] is a conviction

---

[1] That section provides that:

> (a) in general
> Whoever
>
> (7) for the purpose of causing an increase in any payment authorized under this subchapter (or any other program financed in whole or in part from Federal funds), of for the purpose of causing a payment under this subchapter (or any such other program) to be made when no payment is authorized thereunder, or for the purpose of obtaining (for himself or any other person) any payment or any other benefit to which he (or such other person) is not entitled, or for the purpose of obtaining anything of value from any person, *or for any other purpose* . . .
>
> (B) with intent to deceive, falsely represents a number to be the social security account number assigned by the Commissioner of Social Security to him or to another person, when in fact such number is not the social security account number assigned by the Commissioner of Social Security to him or to such other person. .
>
> shall be guilty of a felony and upon conviction thereof

for a crime involving moral turpitude. Such section requires an intent to deceive. *See Matter of P-*, 6 I&N Dec. 795, 798 (BIA 1955). It also involves a crime that impedes the efficiency of the government by deceit or dishonest means and such crimes have been held to constitute crimes involving moral turpitude. *Matter of Flores,* 17 I&N Dec. 225 (BIA 1980).Although respondent relies on *Beltran-Tirado v I.N.S.*, 213 F.3d 1179 (9th Cir. 2000), we find more persuasive the contrary position of *Hyder v Keisler,* 506 F.3d 388 (5th Cir.2007), which held that misusing a social security number obtained by fraud in violation of 42 U.S.C. § 402(a)(7)(A) is a crime involving moral turpitude. The Immigration Judge noted that the indictment states that the respondent used a false social security number "for the purpose of obtaining or retraining an airport identification badge giving him access to secured areas." Ex. 2. The present case involves both an intent to deceive and an impairment of government function. *Cf. Matter of L-V-C-*, 22 I&N Dec. 594 (BIA 1995) (no intent to deceive). As the Immigration Judge observed, the respondent's misconduct involves issues of security for the airport and for airline passengers. We find as did the Immigration Judge that such circumstances satisfy the requirements for a crime involving moral turpitude.

ORDER: The appeal is dismissed.

/s/
FOR THE BOARD

---

shall be fined under Title 18 or imprisoned for not more than five years, or both.

APPENDIX D

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
IMMIGRATION COURT

Oakdale, Louisiana
(St. Louis docket)

File A 94 462 369

[Date: January 16, 2007]

In the Matter of	)
	)
GUILLERMO ALBERTO GUARDADO-GARCIA	)
	)
Respondent	)
	)

IN REMOVAL PROCEEDINGS

CHARGE: Section 212 (a) (6) (A) (i) of the Immigration and Nationality Act, as an alien present in the United States without being admitted or paroled; Section 212 (a) (2) (A) (i) (I) of the Immigration and Nationality Act as an alien convicted of a crime involving moral turpitude

APPLICATION:

APPEARANCES:

ON BEHALF OF RESPONDENT:

Rachel Gronick, Esquire
Law offices of Suzanne Brown, P.C.
9666 Olive Boulevard, Ste. 305
St. Louis, Missouri 63132

ON BEHALF OF THE DEPARTMENT
OF HOMELAND SECURITY:

Monique Harris, Esquire
Assistant Chief Counsel
1010 East Whatley Road
Oakdale, Louisiana 71463

ORAL DECISION OF THE IMMIGRATION JUDGE

I. PROCEDURAL AND FACTUAL HISTORY

The Respondent is a native and citizen of El Salvador. He arrived in the United States near San Jacinto, California on or about December 30, 1989. His arrival in the United States was without inspection by an Immigration officer. On October 10, 2002, Respondent was convicted in the United States District Court, Eastern District of Missouri for the felony offence of misuse of a Social Security number. The offence is in violation of Title 42, United States code 408 (a) (7) (B).

Removal proceedings commenced after issuance of the Notice to Appear, dated January 3, 2003. The Notice to Appear was filed with the court May 1, 2006.

Respondent appeared in an initial Master Calendar proceeding on June 20, 2006, but the matter was reset for him to look for an attorney. At continued proceedings August 15, 2006, Respondent appeared with counsel, but the matter was reset to November 21, 2006.

On that date, Respondent appeared with counsel, who waived an explanation of the nature and purpose of the proceedings as well as the Respondent's rights in proceedings. Respondent, through counsel, admitted the five factual allegations, conceded the charge under 212 (a) (6) (A) (i) of the Act, but denied Respondent's October 10, 2002 conviction was a crime involving moral turpitude under Section 212 (a) (2) (A) (i) (I) of the Act. The Department offered into evidence conviction records. However, Counsel for Respondent did not have the indictment and the case was reset for the Government to send that document to her and review it.

Prior to the next hearing, the court received a memorandum of Law in support of the denial of the charge of removability (Exhibit 3). The court discussed a new course. Ultimate determination, the court will set forth the applicable law regarding the nature of the crime involving moral turpitude.

II. APPLICABLE LAW

The term moral turpitude has been defined by the Attorney General as anything done contrary to justice,

honesty, principle, or good morals; an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow man, or to society in general. Contrary to the accepted rule of right and duty between man and man. The fact that a crime may be considered only a minor offense does not preclude a finding that it involves moral turpitude. See Matter of Serna, 20 I&N Dec. 579, 582 (BIA 1992).

In the Matter of Goldeshtein, 20 I&N Dec. 382, 386 (BIA 1990), the Board of Immigration Appeals held that where fraud is inherent in an offense, it is not necessary that the statue prohibiting it include the usual phraseology concerning fraud in order for it to be a crime involving moral turpitude. The Board went on to hold, following the Board's decision in the Matter of Florin, 17 I&N Dec. 225, 228 (BIA 1980), that where there is an affirmative act calculated to deceive the government, it is therefore inherently fraudulent. If it involves conduct which impairs or obstructs an important function of the department of the government by defeating its efficiency or destroying the value of its lawful operations by deceit, graft, trickery or dishonest means, the conduct would be one that would be considered turpitudinous.

III. ANALYSIS

Respondent was convicted under Title 42 of the United States Code Section 402 (a) (7) (B). That section provides that whoever with intent to deceive, falsely represent a Social Security number assigned by the Commission of Social Security to him or to another person, when in fact such number is not the Social Security account number assigned by the Commission of Social Security to him or to such other persons shall

be guilty of a felony and upon conviction thereof shall be fined under Title 18, or imprisoned for not more than five years, though.

Counsel for Respondent argues the offense is divisible and encompasses offenses of a nature that may or may not involve moral turpitude. Accepting that assumption, the court is required to look to the record of conviction to determine whether or not the offense under which the Respondent was convicted would sustain the grounds of deportability. See Matter of Sweetser, 22 I&N Dec. 709 (BIA 1999). The indictment is included as part of the conviction records marked as Exhibit 2. The indictment states that on September 23, 2001, Respondent knowingly and falsely represented, with an intent to deceive, and for the purpose of obtaining or retaining an airport identification badge, giving him access to secured areas, a number that was the Social Security account number not assigned to him by the Social Security Administration. The Social Security Administration assigned numbers so that these numbers will be identified with the person for future identification for lawful purposes. In this particular day and time, with the threats to the security of the United States, it is definitely in the interest of this country to make sure these numbers are appropriately assigned. In the Respondent's case, he presented a fraudulent number to officials at an airport to obtain an identification badge that would give him access to secured areas. This brings into concern security for the airport and its passengers. The court finds the offense is one which does involve falsity and deceit. The Board has consistently held that offenses which involve deceit or intent to commit fraud against the government is a crime involving moral turpitude. Therefore, the court

would find that the Respondent falsely represented with intent to deceive to obtain or try to obtain an airport identification badge that would give him access to secure areas would meet the definition involving moral turpitude. I find the charge of Deportability or Inadmissability has been established by evidence which is clear and convincing.

The Respondent designated El Salvador as a country for Removal if removal were to become necessary. The Respondent requested no Relief from Removal. Having found that Respondent is deportable as charged and no relief being sought, the following order is hereby entered.

ORDERS

It is hereby ordered the Respondent be REMOVED from the United States to El Salvador based upon the charges contained in the Notice to Appear.

/s/ Agnelis L. Reese
AGNELIS L. REESE
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before AGNELIS L. REESE, in the matter of:

GUILLERMO ALBERTO GUARDADO-GARCIA

A 94 462 369

Oakdale, Louisiana

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/s/ Sheila Boyer
Sheila Boyer, Transcriber

YORK STENOGRAPHIC SERVICES, INC.
34 North George Street
York, Pennsylvania 17401-1266
(717) 854-0077

OCT 10 2007
Completion Date

APPENDIX E

8 U.S.C. §1101(f)

(f) For the purposes of this chapter—
No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established is, or was—
(1) a habitual drunkard;
(2) Repealed. Pub. L. 97-116, § 2(c)(1), Dec. 29, 1981, 95 Stat. 1611.
(3) a member of one or more of the classes of persons, whether inadmissible or not, described in paragraphs (2)(D), (6)(E), and (10)(A) of section 1182(a) of this title; or subparagraphs (A) and (B) of section 1182(a)(2) of this title and subparagraph (C) thereof of such section (except as such paragraph relates to a single offense of simple possession of 30 grams or less of marihuana), if the offense described therein, for which such person was convicted or of which he admits the commission, was committed during such period;
(4) one whose income is derived principally from illegal gambling activities;
(5) one who has been convicted of two or more gambling offenses committed during such period;
(6) one who has given false testimony for the purpose of obtaining any benefits under this chapter;
(7) one who during such period has been confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days

or more, regardless of whether the offense, or offenses, for which he has been confined were committed within or without such period;

(8) one who at any time has been convicted of an aggravated felony (as defined in subsection (a)(43) of this section); or

(9) one who at any time has engaged in conduct described in section 1182(a)(3)(E) of this title (relating to assistance in Nazi persecution, participation in genocide, or commission of acts of torture or extrajudicial killings) or 1182(a)(2)(G) of this title (relating to severe violations of religious freedom).

The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character. In the case of an alien who makes a false statement or claim of citizenship, or who registers to vote or votes in a Federal, State, or local election (including an initiative, recall, or referendum) in violation of a lawful restriction of such registration or voting to citizens, if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of such statement, claim, or violation that he or she was a citizen, no finding that the alien is, or was, not of good moral character may be made based on it.

8 U.S.C. § 1182(a)

(2) Criminal and related grounds
(A) Conviction of certain crimes
(i) In general Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—
(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or
(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21), is inadmissible.

8 U.S.C. §1229b(b)

(b) Cancellation of removal and adjustment of status for certain nonpermanent residents
(1) In general
The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien—
(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;
(B) has been a person of good moral character during such period;
(C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

42 U.S.C. §408

(a) In general
Whoever—
(1) for the purpose of causing an increase in any payment authorized to be made under this subchapter, or for the purpose of causing any payment to be made where no payment is authorized under this subchapter, shall make or cause to be made any false statement or representation (including any false statement or representation in connection with any matter arising under subchapter E of chapter 1, or subchapter A or E of chapter 9 of the Internal Revenue Code of 1939, or chapter 2 or 21 or subtitle F of the Internal Revenue Code of 1954) as to—
(A) whether wages were paid or received for employment (as said terms are defined in this subchapter and the Internal Revenue Code), or the amount of wages or the period during which paid or the person to whom paid; or
(B) whether net earnings from self-employment (as such term is defined in this subchapter and in the Internal Revenue Code) were derived, or as to the amount of such net earnings or the period during which or the person by whom derived; or
(C) whether a person entitled to benefits under this subchapter had earnings in or for a particular period (as determined under section 403 (f) of this

title for purposes of deductions from benefits), or as to the amount thereof; or

(2) makes or causes to be made any false statement or representation of a material fact in any application for any payment or for a disability determination under this subchapter; or

(3) at any time makes or causes to be made any false statement or representation of a material fact for use in determining rights to payment under this subchapter; or

(4) having knowledge of the occurrence of any event affecting (1) his initial or continued right to any payment under this subchapter, or (2) the initial or continued right to any payment of any other individual in whose behalf he has applied for or is receiving such payment, conceals or fails to disclose such event with an intent fraudulently to secure payment either in a greater amount than is due or when no payment is authorized; or

(5) having made application to receive payment under this subchapter for the use and benefit of another and having received such a payment, knowingly and willfully converts such a payment, or any part thereof, to a use other than for the use and benefit of such other person; or

(6) willfully, knowingly, and with intent to deceive the Commissioner of Social Security as to his true identity (or the true identity of any other person) furnishes or causes to be furnished false information to the Commissioner of Social Security with respect to any information required by the Commissioner of Social Security in connection with the establishment and maintenance of the records provided for in section 405(c)(2) of this title; or

(7) for the purpose of causing an increase in any payment authorized under this subchapter (or any

other program financed in whole or in part from Federal funds), or for the purpose of causing a payment under this subchapter (or any such other program) to be made when no payment is authorized thereunder, or for the purpose of obtaining (for himself or any other person) any payment or any other benefit to which he (or such other person) is not entitled, or for the purpose of obtaining anything of value from any person, or for any other purpose—

(A) willfully, knowingly, and with intent to deceive, uses a social security account number, assigned by the Commissioner of Social Security (in the exercise of the Commissioner's authority under section 405(c)(2) of this title to establish and maintain records) on the basis of false information furnished to the Commissioner of Social Security by him or by any other person; or

(B) with intent to deceive, falsely represents a number to be the social security account number assigned by the Commissioner of Social Security to him or to another person, when in fact such number is not the social security account number assigned by the Commissioner of Social Security to him or to such other person; or

(C) knowingly alters a social security card issued by the Commissioner of Social Security, buys or sells a card that is, or purports to be, a card so issued, counterfeits a social security card, or possesses a social security card or counterfeit social security card with intent to sell or alter it; or

(8) discloses, uses, or compels the disclosure of the social security number of any person in violation of the laws of the United States; shall be guilty of a felony and upon conviction thereof shall be fined

under title 18 or imprisoned for not more than five years, or both.

(b) Restitution

(1) Any Federal court, when sentencing a defendant convicted of an offense under subsection (a) of this section, may order, in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to the victims of such offense specified in paragraph (4).

(2) Sections 3612, 3663, and 3664 of title 18 shall apply with respect to the issuance and enforcement of orders of restitution to victims of such offense under this subsection.

(3) If the court does not order restitution, or orders only partial restitution, under this subsection, the court shall state on the record the reasons therefor.

(4) For purposes of paragraphs (1) and (2), the victims of an offense under subsection (a) of this section are the following:

(A) Any individual who suffers a financial loss as a result of the defendant's violation of subsection (a) of this section.

(B) The Commissioner of Social Security, to the extent that the defendant's violation of subsection (a) of this section results in—

(i) the Commissioner of Social Security making a benefit payment that should not have been made; or

(ii) an individual suffering a financial loss due to the defendant's violation of subsection (a) of this section in his or her capacity as the individual's representative payee appointed pursuant to section 405 (j) of this title.

(5)

(A) Except as provided in subparagraph (B), funds paid to the Commissioner of Social Security as

restitution pursuant to a court order shall be deposited in the Federal Old-Age and Survivors Insurance Trust Fund, or the Federal Disability Insurance Trust Fund, as appropriate.

(B) In the case of funds paid to the Commissioner of Social Security pursuant to paragraph (4)(B)(ii), the Commissioner of Social Security shall certify for payment to the individual described in such paragraph an amount equal to the lesser of the amount of the funds so paid or the individual's outstanding financial loss, except that such amount may be reduced by the amount of any overpayments of benefits owed under this subchapter, subchapter VIII of this chapter, or subchapter XVI of this chapter by the individual.

(c) Violations by certified payees

Any person or other entity who is convicted of a violation of any of the provisions of this section, if such violation is committed by such person or entity in his role as, or in applying to become, a certified payee under section 405(j) of this title on behalf of another individual (other than such person's spouse), upon his second or any subsequent such conviction shall, in lieu of the penalty set forth in the preceding provisions of this section, be guilty of a felony and shall be fined under title 18 or imprisoned for not more than five years, or both.

(d) Effect upon certification as payee; definitions

Any individual or entity convicted of a felony under this section or under section 1383a(b) of this title may not be certified as a payee under section 405(j) of this title. For the purpose of subsection (a)(7) of this section, the terms "social security number" and "social security account number" mean such numbers as are assigned by the Commissioner of

Social Security under section 405(c)(2) of this title whether or not, in actual use, such numbers are called social security numbers.

(e) Application of subsection (a)(6) and (7) to certain aliens

(1) Except as provided in paragraph (2), an alien—

(A) whose status is adjusted to that of lawful temporary resident under section 1160 or 1255a of title 8 or under section 902 of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989,

(B) whose status is adjusted to that of permanent resident—

(i) under section 202 of the Immigration Reform and Control Act of 1986, or

(ii) pursuant to section 1259 of title 8, or

(C) who is granted special immigrant status under section 1101(a)(27)(I) of title 8, shall not be subject to prosecution for any alleged conduct described in paragraph (6) or (7) of subsection (a) of this section if such conduct is alleged to have occurred prior to 60 days after November 5, 1990.

(2) Paragraph (1) shall not apply with respect to conduct (described in subsection (a)(7)(C) of this section) consisting of—

(A) selling a card that is, or purports to be, a social security card issued by the Commissioner of Social Security,

(B) possessing a social security card with intent to sell it, or

(C) counterfeiting a social security card with intent to sell it.

(3) Paragraph (1) shall not apply with respect to any criminal conduct involving both the conduct described in subsection (a)(7) of this section to which paragraph (1) applies and any other criminal conduct if such other conduct would be criminal

conduct if the conduct described in subsection (a)(7) of this section were not committed.

185 (2)

No. 10-992

In the Supreme Court of the United States

GUILLERMO GUARDADO-GARCIA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
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Assistant Attorney General
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QUESTION PRESENTED

Whether the court of appeals correctly sustained the Board of Immigration Appeals' determination that a conviction for false representation of a social security number, in violation of 42 U.S.C. 408(a)(7)(B), is a "crime involving moral turpitude" because an element of the offense is that the false representation was made with intent to deceive.

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42 U.S.C. 408(a)(7)(B) ..... *passim*
42 U.S.C. 408(e) 9, 10, 11, 12
42 U.S.C. 408(e)(1) 10
42 U.S.C. 408(g)(2) (1988) 8

Regulation—Continued: Page

8 C.F.R. 1240.20(a) 13

Miscellaneous:

75 Fed. Reg. (2010):

p. 39,556 2

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H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess. (1990) 9, 10, 11

In the Supreme Court of the United States

No. 10-992

GUILLERMO GUARDADO-GARCIA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-9a) is reported at 615 F.3d 900. The decisions of the immigration judge (Pet. App. 15a-20a) and the Board of Immigration Appeals (Pet. App. 12a-14a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 2010. A petition for rehearing was denied on November 3, 2010 (Pet. App. 1a). The petition for a writ of certiorari was filed on January 31, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, specifies classes of aliens who are inadmissible into, and may not be lawfully admitted into,

the United States. 8 U.S.C. 1182. With exceptions not relevant here, an alien is inadmissible if he has been "convicted of," "admits having committed," or "admits committing acts which constitute the essential elements of" a "crime involving moral turpitude." 8 U.S.C. 1182(a)(2)(A)(i)(I).

An inadmissible alien who is ordered removed may seek various forms of relief from removal, including cancellation of removal and adjustment of status under 8 U.S.C. 1229b(b). To qualify for that relief, the applicant (*inter alia*) must not have "been convicted of an offense under [8 U.S.C.] 1182(a)(2)," including a crime involving moral turpitude. 8 U.S.C. 1229b(b)(1)(C). Even if an alien meets all of the statutory requirements to be eligible for cancellation of removal and adjustment of status, the decision whether to grant the application is confided to the Attorney General's discretion. See 8 U.S.C. 1229b(b)(1); see also 8 U.S.C. 1252(a)(2)(B)(i).

2. Petitioner is a native of El Salvador who entered the United States illegally in 1989. Pet. App. 16a. He has never been admitted to the United States.

Beginning in 1994, and continuing through at least September 23, 2001, petitioner made false representations that a particular number was his social security number, including for employment purposes. Thereafter, petitioner was granted temporary protected status and issued a social security account number card.[1] He

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[1] Aliens granted temporary protected status (TPS) may not be removed from the United States while that status is in effect, and are provided work authorization. 8 U.S.C. 1254a(a)(1). Nationals of El Salvador have been eligible for TPS since March 2001. See 75 Fed. Reg. 39,556, 39,557-39,558 (2010). Petitioner's TPS was terminated in January 2003 based on his conviction, and that decision is not at issue here.

then provided his employer with the new, genuine number, revealing that his previous representations were false. See Pet. C.A. Br. 7-8, 11-12 & Add. 11.

In October 2002, pursuant to a guilty plea in the Eastern District of Missouri, petitioner was convicted of falsely representing a social security number to be his own, with intent to deceive, in violation of 42 U.S.C. 408(a)(7)(B). Administrative Record (A.R.) 93. By his plea, petitioner admitted that on or about September 23, 2001, he had used a false social security number with intent to deceive so that he could obtain or retain an airport identification badge. Pet. App. 14a, 18a-19a; see A.R. 98 (indictment). Petitioner was placed on probation for two years and ordered to pay a special monetary assessment of $100. A.R. 94-95.

3. In January 2003, the Immigration and Naturalization Service (whose functions have since been transferred to the Department of Homeland Security (DHS)) charged petitioner with being inadmissible for two reasons: (1) he is present in the United States without having been admitted, and (2) he has been convicted of a crime involving moral turpitude. Pet. App. 17a; A.R. 112. The charges were filed in immigration court in May 2006. A.R. 112.

Through his counsel, petitioner conceded that he is inadmissible as an alien present in the United States without having been admitted, and also admitted the factual allegation that he was convicted of violating 42 U.S.C. 408(a)(7)(B). See Pet. App. 17a. In January 2007, the immigration judge (IJ) sustained the charge that petitioner's conviction rendered him inadmissible as an alien convicted of a crime involving moral turpitude, and ordered petitioner removed based on both of the charged grounds of inadmissibility. *Id.* at 19a-20a. Peti-

tioner made no application for relief from removal, *id.* at 20a, but his counsel stated that "he would have been eligible for cancellation of removal and [also] seeking voluntary departure," if he had not been found inadmissible as an alien convicted of a crime involving moral turpitude. A.R. 84.

4. The Board of Immigration Appeals (Board) affirmed. Pet. App. 10a-14a. The Board determined that violation of Section 408(a)(7)(B) is a crime involving moral turpitude because it "requires an intent to deceive" and "involves a crime that impedes the efficiency of the government by deceit or dishonest means." Pet. App. 14a. Petitioner's use of a false social security number to obtain an airport security badge "involve[d] both an intent to deceive and an impairment of government function." *Ibid.* The Board found "persuasive" the Fifth Circuit's decision in *Hyder* v. *Keisler*, 506 F.3d 388 (2007), which sustained a ruling that misusing a social security number obtained by fraud, in violation of 42 U.S.C. 408(a)(7)(A), is a crime involving moral turpitude. Pet. App. 14a. The Board accordingly rejected petitioner's reliance on a purportedly contrary Ninth Circuit decision, *Beltran-Tirado* v. *INS*, 213 F.3d 1179 (2000). Pet. App. 14a.

5. The court of appeals denied a petition for review. Pet. App. 3a-9a.

The court held that the Board's conclusion that violation of Section 408(a)(7)(B) is a crime involving moral turpitude was reasonable and entitled to deference. Pet. App. 7a, 9a. Petitioner had committed an offense involving "[i]ntent to deceive for the purpose of wrongfully obtaining a benefit," and the court held that under controlling precedent, the Board was reasonable when it held that element to establish moral turpitude. *Id.* at 7a.

Like the Board, the court of appeals rejected petitioner's contention regarding *Beltran-Tirado, supra.* Pet. App. 8a. That case arose "in the context of a statutory exemption from prosecution for a limited category of cases," and that exemption did not control the moral-turpitude inquiry "'in other contexts'" such as this one. *Ibid.* (quoting *Lateef* v. *DHS*, 592 F.3d 926, 931 (8th Cir. 2010)).

The court also rejected petitioner's claim that the Board had violated principles of due process of law by not analyzing his claim using the framework set forth in *In re Silva-Trevino,* 24 I. & N. Dec. 687 (Att'y Gen. 2008). The court concluded that the Board's "analysis was sound and that its conclusion is consistent with the established approach in our circuit." Pet. App. 7a-8a.

ARGUMENT

Petitioner renews his challenge to the Board of Immigration Appeals' decision that his use of a false social security number in violation of 42 U.S.C. 408(a)(7)(B) was a crime involving moral turpitude. The court of appeals correctly rejected that claim. Petitioner pleaded guilty to an offense that includes an element of intent to deceive, which suffices to establish moral turpitude as defined by the Board and accepted by the courts of appeals. The sole decision on which petitioner relies does not create a circuit conflict: petitioner would not qualify for relief under that decision. And even if there were a conflict on the question presented that might warrant this Court's review, this case would not be an appropriate one: petitioner is indisputably inadmissible to the United States irrespective of how the question presented is resolved, and he has not shown any realistic possibility that reversing the decision below would affect

his ability to obtain discretionary relief from removal. This Court's review therefore is not warranted.

1. As the court of appeals correctly recognized, crimes involving fraud or deceit have been understood to involve moral turpitude at least since this Court's decision in *Jordan* v. *De George*, 341 U.S. 223 (1951). In that case, the Court ruled that conspiring to defraud the United States of a lawfully due tax on distilled spirits was a crime involving moral turpitude. *Id.* at 227-229. As the Court observed, "in *every* deportation case where fraud has been proved, federal courts have held that the crime in issue involved moral turpitude." *Id.* at 227 (emphasis added). The Board and the federal courts have likewise concluded that a defendant's intent to deceive, like intent to defraud, makes his crime one involving moral turpitude. See, *e.g.*, *In re Jurado-Delgado*, 24 I. & N. Dec. 29, 35 (B.I.A. 2006) ("[I]t is the intent to mislead that is the controlling factor."); *Ghani* v. *Holder*, 557 F.3d 836, 841 (7th Cir. 2009) ("[N]early every court to consider the issue has concluded that crimes involving willful false statements are turpitudinous.").

Thus, for instance, the courts of appeals agree that the element of "intent to deceive" in another subparagraph of 42 U.S.C. 408(a)(7) makes that offense one involving moral turpitude. *Lateef* v. *DHS*, 592 F.3d 926, 929 (8th Cir. 2010) ("Since intent to deceive for the purpose of wrongfully obtaining a benefit is essential to conviction under § 408(a)(7)(A), the [Board's] interpretation of that crime as one involving moral turpitude is reasonable."); *Hyder* v. *Keisler*, 506 F.3d 388, 391-392 (5th Cir. 2007) ("[A] crime that involves dishonesty as an essential element * * * falls well within this circuit's understanding of the definition of [crimes involving moral turpitude]."); see also *Serrato-Soto* v. *Holder*, 570 F.3d 686,

690 (6th Cir. 2009) (reaching the same conclusion with respect to a state statute prohibiting use of a false social security number, because the crime, "in the ordinary case, involves dishonesty as an essential element"). As the court of appeals correctly recognized, the same principle applies to convictions under Section 408(a)(7)(B), which also involves the element of "intent to deceive." Pet. App. 7a (citing *Lateef*, 592 F.3d at 929).[2]

Petitioner contends (Pet. 7 n.3) that the court of appeals should have decided whether *his* violation of 42 U.S.C. 408(a)(7)(B) involved moral turpitude by "look-[ing] to the ultimate goal which he was seeking to accomplish" by committing his crime. But where the statute of conviction includes an element that is alone sufficient to establish moral turpitude under the Board's definition, the Board is not required to engage in a more granular examination of the facts of each particular conviction.[3]

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[2] Petitioner briefly asserts (Pet. 10-11) that violation of Section 408(a)(7)(B) is less culpable than violation of Section 408(a)(7)(A). The decisions cited in the text, however, rely on the element of "intent to deceive," which is common to both offenses.

[3] Petitioner also argues (Pet. 10 n.6, 12-14) that the court of appeals should have remanded based on *In re Silva-Trevino*, 24 I. & N. Dec. 687 (Att'y Gen. 2008). As petitioner recognizes, however, *Silva-Trevino* would affect the analysis only if neither the statute of conviction nor the record of conviction were sufficient to establish that petitioner's offense involved moral turpitude. See *id.* at 698-699. But an IJ "need not consider additional evidence or testimony except when and to the extent he or she determines that it is necessary." *Id.* at 703; see also *id.* at 703 n.3 (where an alien's crime includes a fraud element that makes it turpitudinous, the alien "cannot avoid categorical treatment of his conviction as a crime involving moral turpitude by arguing that he did not actually have such intent when he committed the crime"). Because the statute and record of conviction are sufficient here, neither the IJ, nor the Board, nor the court of appeals had any need to seek or consider ad-

2. Petitioner contends (Pet. 2, 4-9) that the decision of the court of appeals conflicts with *Beltran-Tirado* v. *INS*, 213 F.3d 1179 (9th Cir. 2000). That claim lacks merit and, in any event, would not be a basis for further review in this case.

a. In *Beltran-Tirado*, a divided panel of the Ninth Circuit ruled that an alien did not commit a crime involving moral turpitude when she violated 42 U.S.C. 408(g)(2) (1988), the statutory predecessor of Section 408(a)(7)(B).[4] Beltran-Tirado began using another person's name and social security number as her own beginning in 1972. She was arrested in April 1991, and she was subsequently convicted under Section 408(g)(2) of making a false attestation to obtain employment at a restaurant. 213 F.3d at 1182. She applied for registry under 8 U.S.C. 1259, a form of relief from removal available to aliens who, *inter alia*, entered the United States before 1972 and are persons of "good moral character." 8 U.S.C. 1259(a) and (c). The Board held that her conviction was for a crime involving moral turpitude and therefore prevented her from satisfying the character criterion. 213 F.3d at 1183.

The Ninth Circuit majority stated that the "text of the statute and federal decisional law provide[d] no clear answer to" the question whether violation of Section 408 is a crime involving moral turpitude. 213 F.3d at 1183.

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ditional evidence. See Pet. App. 7a-8a (rejecting petitioner's argument based on *Silva-Trevino*).

[4] Congress redesignated the provision in 1990 but did not substantively amend it. See Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 5121(b)(2)-(4), 104 Stat. 1388-283. Beltran-Tirado also violated 18 U.S.C. 1546(b)(3), but the convictions involved identical facts and the court analyzed the moral-turpitude issue identically with respect to both convictions. See 213 F.3d at 1182, 1183, 1184.

But, the court concluded, the Board's decision was contrary to legislative history of a subsequent amendment to another part of Section 408, was therefore due no deference, and must be reversed. *Id.* at 1183-1184.

In 1990, Congress had amended Section 408 expressly to exempt certain violations of Section 408(a)(7) from prosecution, *if* those violations were committed before January 4, 1991, by an alien who (inter alia) was awarded registry under Section 1259. See 42 U.S.C. 408(d) (1994) (now 42 U.S.C. 408(e)).[5] Beltran-Tirado was not exempted by that amendment, because she had not yet sought or been awarded registry and because she fell outside the statute's time period. 213 F.3d at 1184 & n. 9. But at the time the exemption from prosecution was adopted, members of a House-Senate conference committee had stated in a conference report that they "believe[d] that individuals who are provided exemption from prosecution under this proposal should not be considered to have exhibited moral turpitude with respect to the exempted acts for purposes of determinations made by the Immigration and Naturalization Service." *Id.* at 1183 (quoting H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess. 948 (1990) (Conference Report)). Based on that legislative history, the Ninth Circuit concluded that "the crimes of which [Beltran-Tirado] was convicted do not establish 'moral turpitude,'" because even though Beltran-Tirado was not eligible for the exemption from prosecution, "the underlying behavior is the same." *Id.* at 1184.

b. Petitioner cannot establish a conflict based on *Beltran-Tirado*, because he gives no reason to conclude

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[5] Congress redesignated Subsection (d) as Subsection (e) in 2004. Social Security Protection Act of 2004, Pub. L. No. 108-203, § 209(a)(1), 118 Stat. 513.

that the Ninth Circuit would reach a similar conclusion in his case. The exemption at issue in *Beltran-Tirado* applied only to aliens who were eligible for particular, limited categories of relief, such as registry, which (as noted above) is open only to aliens who entered the United States before 1972. 8 U.S.C. 1259(a); 42 U.S.C. 408(e)(1). And the exemption did not apply to crimes committed after January 4, 1991. Petitioner has never applied for registry or any other qualifying form of relief, and there is no indication that he could; he entered the United States long after 1972. And petitioner's unlawful conduct began long after the exemption ceased to apply to *anyone*, whereas Beltran-Tirado's offenses were committed at most "a few weeks too late." 213 F.3d at 1184.[6] Accordingly the holding of *Beltran-Tirado* may have little continuing relevance, as the exemption under Section 408(e) no longer applies to anyone and the class of aliens who, like Beltran-Tirado, only barely missed qualifying for the exemption presumably is now vanishingly small.[7]

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[6] Moreover, the Ninth Circuit emphasized that Beltran-Tirado used a false social security number "to further otherwise legal behavior," *i.e.*, employment. 213 F.3d at 1184; see Conference Report 948 ("otherwise lawful conduct," such as "employment"). It is far from clear that the congressional conferees, or the Ninth Circuit, would take the same view of petitioner's use of a false social security number to gain access to secure areas of an airport—even if, as petitioner contends, he did so for employment purposes. Pet. 7 n.3.

[7] The Ninth Circuit has not subsequently decided in any precedential opinion how the holding of *Beltran-Tirado* would apply to a conviction under Section 408(a)(7)(B) obtained long after the exemption expired. But cf. *Jimenez* v. *Gonzales*, 158 Fed. Appx. 7, 8-9 (9th Cir. 2005) (remanding based on *Beltran-Tirado* in the case of an alien who used a false social security number, but was not convicted under Section 408(a)(7) or any other statute).

c. The Ninth Circuit's outlier decision in *Beltran-Tirado* would not in any event furnish a basis for review by this Court. The Ninth Circuit's decision did not address or apply this Court's decision in *Jordan*, *supra*, or any other generally applicable precedent on the meaning of moral turpitude. Rather, the Ninth Circuit concluded that "the intent of Congress [wa]s clear" to create a special rule applicable only to violations of Section 408(a)(6) and (7). 213 F.3d at 1185. The holding of *Beltran-Tirado* therefore does not affect any class of moral-turpitude cases in the Ninth Circuit except (at most) cases involving this specific offense.

The Ninth Circuit's reasoning was also unpersuasive. In adopting the exemption from prosecution now set out in Section 408(e), Congress did not amend the INA at all, let alone the provisions governing moral turpitude. Neither the statutory text nor the Conference Report manifested any intent to overturn the agency's long-standing view, grounded in this Court's decision in *Jordan*, that an element of intent to deceive supports classifying an offense as one involving moral turpitude. Nor did Congress remove the element of intent to deceive from the offense of which petitioner was later convicted.

Moreover, even if it were proper to give controlling weight to the passage of legislative history on which the Ninth Circuit relied, the Ninth Circuit nonetheless misread that passage. The conferees did not opine that individuals who were *ineligible* for the exemption from prosecution, and who thus were convicted under Section 408(a)(7)(B), necessarily acted without moral turpitude. To the contrary, the conferees emphasized that "individuals *who are provided exemption from prosecution* under this proposal should not be considered to have exhibited moral turpitude." Conference Report 948 (em-

phasis added). Several provisions of the INA treat individuals who admit committing crimes involving moral turpitude as equivalent to those who are formally convicted of such crimes. See 8 U.S.C. 1182(a)(2)(A)(i)(I) ("[A]ny alien convicted of, *or* who admits having committed, *or* who admits committing acts which constitute the essential elements of * * * a crime involving moral turpitude * * * is inadmissible.") (emphases added); see also 8 U.S.C. 1101(f)(3) (aliens described in Section 1182(a)(2)(A) do not meet "good moral character" requirements). The better reading of the conferees' statement is that individuals actually exempted from prosecution under Section 408(e) should not be treated as having committed a crime involving moral turpitude if they admit only that they committed a crime for which they are exempted from prosecution. The conferees did not opine that violation of Section 408(a)(7) is *never* turpitudinous, even when committed by an individual who lacks the mitigating characteristics that would make him eligible for the exemption.

For these reasons, every other court of appeals that has examined the question since *Beltran-Tirado* has declined to follow the Ninth Circuit's decision, as the Board did here. See *Hyder*, 506 F.3d at 393 (observing that the *Beltran-Tirado* court "appears to have expanded a narrow exemption beyond what Congress intended," and declining to follow *Beltran-Tirado* because it "would require us to ignore our existing precedents, which establish that crimes involving intentional deception as an essential element are generally [crimes involving moral turpitude]"); accord Pet. App. 8a; *Serrato-Soto*, 570 F.3d at 692; *Lateef*, 592 F.3d at 930-931. Should the issue recur in the Ninth Circuit, therefore, that court may re-examine or limit *Beltran-*

Tirado in light of the broad consensus view adopted by the other circuits.

3. Even if this issue might warrant the Court's review in some case, this case is not an appropriate vehicle, because petitioner fails to show that resolving this issue in his favor would make any difference. Petitioner has conceded that he is inadmissible on grounds unrelated to his conviction. Pet. App. 17a; A.R. 77. Petitioner contends (Pet. 2) that he seeks further review because classifying his conviction as one involving moral turpitude precludes him from seeking cancellation of removal and adjustment of status. But even if the conviction did not disqualify petitioner from that form of discretionary relief—for which he has never applied—petitioner has not shown any realistic possibility that he would be able to obtain relief.

Petitioner did not file an application for cancellation of removal, see 8 C.F.R. 1240.20(a) (application required), and did not have a hearing on his eligibility. Pet. App. 20a; pp. 3-4, *supra*. He therefore has presented no evidence that he could carry his burden to show that he meets the other eligibility requirements: continuous physical presence and good moral character for ten years, see 8 U.S.C. 1229b(b)(1)(A)-(B), and "exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or a [lawful permanent resident]," 8 U.S.C. 1229b(b)(1)(D). His petition asserts (Pet. 3) only that he has children who are United States citizens, but petitioner has not claimed that any hardship to them resulting from his removal would rise to the level of "exceptional and extremely unusual hardship" as required under the statute, which is greater than the ordinary hardship to be expected to result from an alien's removal.

See *In re Monreal-Aguinaga*, 23 I. & N. Dec. 56, 62 (B.I.A. 2001). Furthermore, even if eligible, petitioner would have to establish that he warrants relief as a matter of discretion. See, *e.g.*, *In re A-M-*, 25 I. & N. Dec. 66, 76-77 (B.I.A. 2009). He has presented no evidence from which to conclude that he could do so.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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